

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY CLARK CHENAULT,

Defendant-Appellant.

UNPUBLISHED
October 27, 2000

No. 211976
Genesee Circuit Court
LC No. 97-001213-FH

Before: Collins, P.J., and Jansen and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of unarmed robbery, MCL 750.530; MSA 28.798. He was sentenced as a third habitual offender, MCL 769.11; MSA 28.1083, to ten to thirty years' imprisonment. Defendant appeals as of right. We affirm.

Defendant was charged with unarmed robbery after he took a cash register from a pizzeria. He admitted taking the cash register, but denied that he struggled with, used force against, or threatened anyone in the process. The defense theory was that, at most, defendant was guilty of larceny.

In his sole issue on appeal, defendant contends that the trial court abused its discretion in permitting the investigating officer on the scene to testify that, on the basis of witness accounts and for purposes of the complaint, he classified the crime as strong-armed robbery. Because the officer was not qualified as an expert, MRE 701 governs the admissibility of his opinion. *People v Daniel*, 207 Mich App 47, 57; 523 NW2d 830 (1994). MRE 701 limits a lay witness' opinion testimony to opinions or inferences that are rationally based on the perception of the witness from direct physical observation, *People v Hanna*, 223 Mich App 466, 475; 567 NW2d 12 (1997), and are helpful to a clear understanding of a fact in issue. *Daniel, supra*.

Because the investigating officer's opinion with regard to which legal statute had been violated was not based on his own perception, but rather was based on witness accounts of the event, the trial court abused its discretion in allowing the testimony. However, our review of the record satisfies us that the trial court's error in this regard was harmless. "[A] preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is

more probable than not that the error was outcome determinative.” *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999), quoting MCL 769.26; MSA 28.1096. In other words, reversal is not required unless “it affirmatively appears that the error asserted ‘undermine[s] the reliability of the verdict.’” *Lukity*, *supra* at 495, quoting *People v Mateo*, 453 Mich 203, 211; 551 NW2d 891 (1996).

Here, both the owner of the pizzeria, Serafino Salvati, and one of his employees testified to a struggle between Salvati and the person who took the cash register. Salvati testified that after the perpetrator threw the cash register into the trunk of a car parked just outside, he came back toward Salvati with the cash drawer from the register, raising it as if he meant to hit Salvati with it. Fearing that he would be struck, Salvati grabbed the perpetrator’s arm and pulled his hat off. The perpetrator yelled at him not to look at him, and threw down the drawer and ran away. Salvati’s employee, Dennis Davis, testified that he saw the person who took the register and Salvati struggling and that it appeared that the perpetrator was trying to hit Salvati with the change drawer.

The record also shows that after the prosecutor first elicited the officer’s testimony concerning the type of complaint, the trial court instructed the jury as follows:

I’m going to ask that the jury strike from their minds the comment of strong-armed robbery. The charge that’s before this Court is unarmed robbery and that is what you’re going to have to decide, whether it’s unarmed robbery or some lesser included offense.

Although the court allowed the officer to explain why he classified the crime as he did, the court stated as follows:

The jury’s already, again, been advised what the charge is. They know that the police don’t decide what the charges are, the Prosecutor decides what the charge is, and they’re here now to decide whether or not the prosecution can prove beyond a reasonable doubt the charge.

The court later instructed the jury that, in reaching its decision, the jury was not to consider any testimony that the court had stricken. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). On this record, it does not affirmatively appear that admission of the officer’s testimony affected the reliability of the verdict; therefore, its admission does not require reversal of defendant’s conviction.

Affirmed.

/s/ Jeffrey G. Collins

/s/ Brian K. Zahra